90-1609

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the conflict between federal policy or interest and the operation of state law, required for the application of the government contractor's defense, a conflict between the general federal interest in military procurement and state law or, as petitioners contend, a conflict between the federal interest as expressed in the specific procurement contract and state law?

2. May the government contractor's defense be applied when the design choice at issue did not involve the exercise of a discretionary function by the Government?

3. Should the government contractor's defense be struck from the pleadings when it is undisputed that there is no conflict between the federal interest as expressed in the procurement contract and the operation of state law?

4. May the government contractor's defense be found to apply as a matter of law when the record reveals genuine issues of material fact regarding the availability of the defense?

5. On a motion for summary judgment, may a defense be deemed abandoned when the record reflects conflicting facts on that defense and the conflict has been brought to the court's attention?

LIST OF PARTIES

Petitioners are Marilyn Guerinot, individually, and as representative of the Estate of Major Thomas C. Guerinot and as next friend of Timothy and Jonathan Guerinot, minors, plaintiffs and appellants below, and respondents are Rockwell International Corporation and Precision Sensors, Inc., defendants and appellees below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES. v

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. THE CONFLICT REQUIRED FOR THE APPLICATION OF THE GOVERNMENT CONTRACTOR'S DEFENSE IS A CONFLICT BETWEEN THE FEDERAL INTEREST AS EXPRESSED IN THE PROCUREMENT CONTRACT AT ISSUE AND THE OPERATION OF STATE LAW . . 7

II. THE GOVERNMENT CONTRACTOR'S DEFENSE CANNOT BE APPLIED IF, AS HERE, THE GOVERNMENT HAS NOT EXERCISED A DISCRETIONARY FUNCTION TOWARDS THE DESIGN FEATURE IN QUESTION. 12

III. THE MOTION TO STRIKE THE GOVERNMENT CONTRACTOR'S DEFENSE SHOULD BE GRANTED 15

Page

IV. THE RECORD REVEALS GENUINE ISSUES OF MATERIAL FACT REGARDING THE APPLICABILITY OF THE GOVERNMENT CONTRACTOR'S DEFENSE 16

V. DEFENSES SHOULD NOT BE DEEMED ABANDONED WHEN THE PARTY RAISING THOSE DEFENSES HAS NOT MANIFESTED ANY INTENT TO ABANDON THEM. 17

CONCLUSION. 19

APPENDIX A

MEMORANDUM, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 18, 1991 . . . A1

APPENDIX B

ORDER RE SUMMARY JUDGMENT, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, FILED MAY 9, 1989 . . . . . B1

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986) 17

Boyle v. United Technologies Corp.
487 U.S. 500 (1988) 2, 7-13

Celotex Corp. v. Catrett
477 U.S. 317 (1986) 17

Clearfield Trust Co. v. United States
318 U.S. 363 (1943) 9

Matsushita Electric Industrial Co. v.
Zenith Radio Co.
475 U.S. 574 (1986) 17

Miree v. DeKalb County
433 U.S. 25 (1977). 10

Mitchell v. Lone Star Ammunition, Inc.
913 F.2d 242 (5th Cir. 1990). 12

Trevino v. General Dynamics Corp.
865 F.2d 1474 (5th Cir. 1989) *cert. den. sub. nom.* General Dynamics Corp. v. Trevino, __ U.S. __, 110 S.Ct. 327. . . . . .13, 14

Statutes

28 U.S.C. §1254(1). 2
28 U.S.C. §1332(a)(1) 2

Page

Rules

United States Supreme Court Rules
Rule 10(a) 12
Rule 10(c) 12

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

MARILYN GUERINOT, individually, and as representative of the Estate of Major THOMAS C. GUERINOT and as next of friend of TIMOTHY and JONATHAN GUERINOT, minors,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION and PRECISION SENSORS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 18, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been reported, and is reprinted in the appendix hereto, pp. A1-A9, *infra*.

The memorandum decision of the United States District Court for the Southern District of California (Turrentine, D.J.) has not been reported. It is reprinted in the appendix hereto, pp. B1-B8, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1991. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The jurisdiction of the District Court was based on the diversity of citizenship between the parties. (28 U.S.C. §1332(a)(1).)

The death of the military pilot in this case, Major Thomas C. Guerinot, was caused by the failure of the escape system's speed sensor to function properly in a ground-level ejection. Instead of deploying the parachute in one-eighth of a second, as it had been designed to do in a ground-level ejection, the speed sensor deployed the parachute after two seconds, as if ejection was occurring at an altitude of over 10,000 feet. While a co-pilot ejected safely, Major Guerinot died when his seat hit the ground.

The primary issue in this case is whether there is a sufficient conflict between federal interest or policy, as expressed in the federal contract calling for the speed sensor, and the operation of state law, in order to justify the displacement of state law. (*Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) [displacement

will occur only where a significant conflict exists between an identifiable federal policy or interest and the operation of state law].) The district court, on defendants' motions for summary judgment, ruled that as a matter of law the government contractor's defense applied and the court of appeals affirmed. At the same time defendants moved for summary judgment, petitioners moved for a partial summary adjudication to strike the government contractors' defense from the answers, contending that since there was no conflict between the contract requirements and state law, the defense did not apply as a matter of law. The district court's order granting defendants' motions for summary judgment disposed of petitioners' motion.

In November 1963, the Department of the Navy issued a "Type Specification" for a proposal seeking a light counterinsurgency, armed aircraft, Model OV-10A. The Type Specification required "emergency escape throughout the entire flight envelope of the aircraft . . . including ground level escape at zero airspeed." In September 1964, shortly after the Navy had issued its testing requirements for Model OV-10A, Rockwell's predecessor, North American Aviation, Inc.,[1] issued document NA64H-895 which set forth the specifications for the escape system at issue in this case. NA64H provided, among other things, for a dual mode sensor system which would use altitude and airspeed to activate the ejection seat system in either a high or low mode.

The ejection system specified in NA64H-895 allows the pilot in the front seat to initiate ejection and parachute deployment for both the front and rear seats. The speed sensor determines when the ejection seat

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[1] All references will be to Rockwell rather than North American Aviation, as in the opinions and papers filed below.

deploys, based on altitude and airspeed. In low mode, originally intended to encompass ejections from an area of zero altitude, zero forward speed to a maximum altitude of 10,000 feet and 200 knots, there is a one-eighth of a second delay between the moment the seat leaves the aircraft and the beginning of parachute deployment. In high mode, designed for ejections beyond the maxima applicable to ejections in the low mode, the delay is extended to two seconds to allow enough time, before parachute deployment, for the seat to clear the aircraft.

The speed sensor had been designed by Rockwell before 1964. (Exhibit 6, para. 15, and Exhibit 16, Appellants' Excerpts of Record.) The Navy's action on the speed sensor is shown by a letter from the Naval Air Systems Command to Rockwell which 'released' the drawings and specifications of the speed sensor. (Exhibit 33, Appellants' Excerpts of Record.) The court of appeals found the Navy had approved the speed sensor, and the district court had found likewise. (Appendix, pp. A3, B2, *infra*.)

On November 15, 1965, after testing, the Navy issued document SD-556-1 (revision No. R-4) which specified that the ejection system be built in accordance with specification NA64H-895.

After further negotiations, the Navy, in 1966, ordered 223 model OV-10A aircraft from Rockwell. Rockwell, in turn, contracted with Precision Sensors, Inc. ("PSI") for the manufacture of a speed sensor, in accordance with the specifications which had been 'released' by the Navy in 1965.

The speed sensor uses an endcap which is attached onto a plunger. To ensure that the endcap is properly attached to the plunger, to prevent movement of the endcap, and to maintain the proper clearance between the endcap and the plunger, a locking agent must be

used. PSI advanced as an undisputed material fact before the district court that PSI has found the utilization of "loctite," an industrial strength thread locking compound, to be the best way to ensure a lack of movement between the endcap and the plunger. (Clerk's Record 51, para. 33, Appellants' Excerpts of Record.) The court of appeals found that loctite is widely used by the Navy and in industry. (Appendix, p. A8, *infra.*) However, a PSI official testified in his deposition that drilling and pinning would have been a suitable alternative to loctite. (Exhibit 32, Appellants' Excerpts of Record.)

The speed sensor specification which had been 'released' by the Navy in 1965 provided in relevant part that the speed sensor could utilize "standard instrument locking practices using epoxy cement to lock and seal threaded parts that are too small to safety wire." (Exhibit 29, Appellants' Excerpts of Record.)

The speed sensor in Major Guerinot's ejection seat failed to operate in the low mode because the plunger in the speed sensor had not extended quickly enough to activate the low mode. The government's investigations, a government engineer and defense and plaintiffs' experts whose depositions were taken in this action, all showed that the plunger had been fouled by loctite and therefore did not extend quickly enough to activate the low mode. (Exhibits 43, 44, 45, 56, and 57, Appellants' Excerpts of Record.)

In their opposition to the motions for summary judgment, petitioners summarized the state of the evidence on yet another cause for delay in plunger extension. This summary showed that there was some galvanic corrosion around an 0-ring retainer on the plunger but that one expert had testified that this was not enough to 'hang up' the plunger. (Clerk's Record 55, pp. 18-19, Appellants' Excerpts of Record.) Although petitioners

made clear that this was not an abandonment of their theory that galvanic corrosion may have contributed to the delay in plunger extension in supplemental papers filed before the district court entered judgment, both the district court and the court of appeals concluded that petitioners had abandoned this theory of recovery. (Appendix, pp. A9, B6, *infra*.)

In 1971, the Navy requested certain changes in the speed sensor which included changes in the airspeed tolerance of the speed sensor. Those changes were made, and this brought about a change in the designation of the speed sensor from the former "-1" designation to the "-9" sensor which was the type of sensor installed in the accident aircraft. Beginning in 1973, PSI made strong representations that the maintenance manual for the speed sensor be updated. This was not done until 1982 and the accident aircraft was last overhauled in 1980.

Whether the maintenance manual, provided by PSI, gave adequate warning regarding the use of loctite, remains a contested issue of fact even though both the district court and the court of appeals overlooked this. Mr. McKeown, a government engineer, who worked at the facility where the accident aircraft was overhauled, examined the speed sensor of the accident aircraft and thereafter had changes made in the maintenance manual which, in his opinion, prevented a recurrence of the fouling which had retarded plunger extension in Major Guerinot's ejection system. (Exhibit 67, Appellants' Excerpts of Record.) In the opinion of a PSI official, however, the maintenance manual, as PSI had drafted it, adequately dealt with the "possibility that excessive loctite had been applied and assure that any possible anomalous function resulting from that misapplication

will be disclosed." (Exhibit 56, Appellants' Excerpts of Record.)

The court of appeals concluded that the evidence showed that the extraneous loctite contamination was sufficient to cause the plunger to activate improperly and went on to find that the extraneous loctite would not have caused the accident if the curing and testing requirements had been followed when the sensor was overhauled. (Appendix, pp. A4-A5, *infra*.) This controverted Mr. McKeown's testimony in his deposition when he had stated that the capillary action which had drawn the loctite along the plunger "could occur within the guidelines of the manual, in the sense that no specific precautions were provided about that being a possibility." (Clerk's Record 55, pp. 16-17, Appellants' Excerpts of Record.)

REASONS FOR GRANTING THE WRIT

I.

THE CONFLICT REQUIRED FOR THE APPLICATION OF THE GOVERNMENT CONTRACTOR'S DEFENSE IS A CONFLICT BETWEEN THE FEDERAL INTEREST AS EXPRESSED IN THE PROCUREMENT CONTRACT AT ISSUE AND THE OPERATION OF STATE LAW

The court of appeals noted that the petitioners in this case have "... strenuously argue[d] that before the three-part test [of *Boyle v. United Technologies Corp.*, *supra*, 487 U.S. 500] is applied, this court must first find

a conflict between a federal interest embodied in the contract requirements and the duty imposed by state law." (Appendix, p. A7, *infra*.) The court of appeals then went on to hold:

> "The *Boyle* analysis, however, does not require, as appellant contends, that the Government have an interest in each and every feature of the aircraft. Rather, once a federal interest or policy has been identified, here, the procurement of military aircraft, the court must then determine, without regard to the contract requirements, whether a 'significant conflict' exists between that interest or policy and a finding of liability under state law." (Appendix, p. A7, *infra*.)

This Court in *Boyle* noted, as did the court of appeals in this case (Appendix, p. A7, *infra*), that the cost of federal procurement contracts directly affects the interests of the United States. (*Boyle v. United Technologies Corp., supra*, 487 U.S. 500, 507. The Court in *Boyle* then observed:

> "That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law. [Footnote omitted] Displacement will occur only where, as we have variously described, a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,'

> [citation] or the application of state law would 'frustrate specific objectives' of federal legislation [citation]." (*Boyle, supra,* 487 U.S. 500, 507.)

As noted, the court of appeals in this case identified the federal interest to be one of forestalling a rise in the costs of procurement contracts, if liability were imposed under state law. (Appendix, p. A7, *infra* ["The present case presents facts similar to those in *Boyle*. If liability is imposed, the result will likely be that the contractor will either increase prices in order to insure against future liability, or the contractor will decline future contracts."]) This is not only entirely unsupported and even specifically rejected by *Boyle*, as the preceding citation shows, it exempts from the application of state law each and every federal procurement contract. This is a sweeping assertion of federal power, wholly unsupported by the law as it has developed since *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), the landmark decision on the application of federal law where the federal interest arises in a diversity case. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 508, n. 4.)

This Court in *Boyle* made very clear that it is not the generalized federal interest in the costs of procurement but the federal interest, as specifically articulated in the contract, which is protected by the application of federal common law, *i.e.*, the government contractor's defense. In *Boyle*, this Court held that the defense applied because the plaintiffs in that case claimed state law required an escape hatch mechanism which opened *in*, while the federal procurement contract called for a hatch which opened *out*, and where the design obstructed, or so the plaintiff claimed, access to the escape hatch

mechanism. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 503, 509 ["Here the state-imposed duty of care that is the asserted basis of the contractor's liability (*specifically*, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications)." (emphasis added)].) The focus was on the federal decision to have a helicopter hatch which opened in; this Court did not apply the federal common law in *Boyle* simply and only because a federal contract was involved.

In distinguishing the facts, and result, of *Boyle* from cases where federal common law was *not* to be applied, this Court referred to *Miree v. DeKalb County,* 433 U.S. 25, 30 (1977) and a hypothetical "intermediate situation" as illustrative. (*Boyle, supra,* 487 U.S. at 509.) In *Miree,* the Court noted, "it was the contractual duty *itself* that the private plaintiff (as third party beneficiary) sought to enforce" (emphasis in original); hence, the suit in *Miree* "was not seeking to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract." (*Boyle, supra,* 487 U.S. at 508.) We have contended throughout that the duty the contract imposed in Major Guerinot's case was a recovery in the low mode; indeed, the Navy investigations of the accident forcefully endorsed this. (Clerk's Record 55, p. 21, Appellants' Excerpts of Record.) Petitioners in this case claim nothing more, and nothing less, than that the recovery should have been in the low mode. The duty under the contract, and the duty being claimed by plaintiffs, is one and the same. Under this Court's analysis in *Boyle* of this kind of situation, the conclusion is compelled that there is no

conflict, and that federal common law therefore cannot, and must not, be applied.

The same is true if petitioners' case is compared to the "intermediate situation" addressed in *Boyle,* where the duty sought to be imposed on the contractor is not identical to the one assumed under the contract but is also not contrary to the contract (487 U.S. at 509). It is true that, in a larger sense, the duty sought to be imposed is to have effected a recovery in the low mode, which is the duty imposed by the contract, and therefore the "intermediate situation" really does not apply. However, if petitioners' case is viewed more narrowly as claiming that loctite should not have been used or, if used, safeguards which the Navy adopted after the accident should have been implemented before the accident, then nothing in petitioners' case is contrary to the contract for the contract did not require loctite, but merely a suitable locking agent. That the choice of loctite was the contractor's, and not the Government's, we take up as a separate matter in Argument II.

In any event, we point to the Court's statement in *Boyle* that, in the "intermediate situation," "[n]o one suggests that state law would generally be pre-empted in this context." (*Boyle, supra,* 487 U.S. 500, 509.) In this case, not only has it been suggested that state law be displaced, the district court and the court of appeals have so held. We submit that only was this erroneous, it has completely rewritten the law on this subject in a way which *Boyle* specifically proscribed: the court of appeals has applied federal law in a diversity case only and solely because the contract was for the procurement of equipment by the United States. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 507 ["That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end

the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law [footnote omitted]."].) This is a very fundamental conceptual error with far-reaching consequences for, as has been observed, the government contractor's defense has the potential of displacing ". . . large chunks of the states' traditional prerogative over tort law, ..." (*Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 247, n. 9 (5th Cir. 1990).)

For the reasons stated, the court of appeals' decision in this case conflicts with the decision of this Court in *Boyle* and the extension of federal jurisdiction effected by the decision of the court of appeals in this case calls for the exercise of this Court's power of supervision, all within the sense of Rules 10(a) and 10(c) of the rules of this Court.

II.

THE GOVERNMENT CONTRACTOR'S DEFENSE CANNOT BE APPLIED IF, AS HERE, THE GOVERNMENT HAS NOT EXERCISED A DISCRETIONARY FUNCTION TOWARDS THE DESIGN FEATURE IN QUESTION

Once state law is to be displaced because there is a conflict between the federal interest as expressed in the contractual provision at issue and the operation of state law, the question is what the scope of the displacement is. In approving the three-part test for the scope of that displacement, this Court has noted that the first two prongs of that test — approval of reasonably precise specifications and conformance to those specifications

— ". . . assure that the suit is within the area where the policy of 'discretionary function' would be frustrated — i.e., they assure that the *design feature in question* was considered by a Government officer, and not merely the contractor itself." (Emphasis added.) (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 512.)

The record in this case establishes that it was the contractor, PSI, who made the decision to use loctite in the speed sensor. We would like to stress that it was PSI which advanced as an uncontested fact that it had made the decision to use loctite in the speed sensor. (Clerk's Record 51, para. 33, Appellants' Excerpts of Record.) Proposed as an uncontested fact, it has remained, and is, uncontested.

While it is clear that the Government approved the speed sensor when it "released" the drawings (Exhibit 33, Appellants' Excerpts of Record), approval is not the same as the exercise of a discretionary function. Testimony by PSI's own employee shows that the only agency which exercised any discretion in the choice of loctite was PSI. That employee testified that there was a viable and effective alternative to loctite — drilling and pinning — but that PSI opted for loctite. (Exhibit 32, Appellants' Excerpts of Record.) Moreover, once the Government became aware of the dangers of loctite in the speed sensor, *i.e.*, after Major Guerinot was killed, it made changes in the PSI-produced maintenance manual which accounted for the dangerous properties of this substance. (Exhibit 67, Appellants' Excerpts of Record.)

Approval of the contested design feature must constitute a discretionary function on the part of the Government. (*Boyle v. United Technologies Corp., supra,* 487 U.S. 500, 511-512; *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989) *cert. den. sub. nom. General Dynamics Corp. v. Trevino,* __ U.S. __, 110

S.Ct. 327.) Approval "... under the *Boyle* defense requires more than a rubber stamp." (*Trevino v. General Dynamics Corp., supra,* 865 F.2d 1474, 1480.) The cryptic, three-line Navy memorandum (Exhibit 33, Appellants' Excerpts of Record) "releasing" the speed sensor drawings is approval thereof but, as we have seen, the record shows that the actual decision to use loctite in the sensor was PSI's alone — by its own admission. That discrete decision did not even receive the rubber stamp which the speed sensor drawings were accorded.

The court of appeals noted that the Navy, and industry, uses loctite and is familiar with it. (Appendix, p. A4, *infra.*) That has no bearing on whether it was wise to use it where it was used. The decision to do so was the contractor's, and not the Government's, and for this reason alone, the government contractor's defense should not be applied this case.

We submit the record establishes that no discretionary function was exercised by the Government and for this reason the first prong of the test — approval of specifications — has not been met. However, if the record does not incontestably establish this, at the very least the record shows a triable issue of fact. For this reason, which petitioners also urged vigorously in the courts below, respondents' motions for summary judgment should have been denied.

III.

THE MOTION TO STRIKE THE GOVERNMENT CONTRACTOR'S DEFENSE SHOULD BE GRANTED

Simultaneously with Rockwell's and PSI's motions for summary judgment, the petitioners made a comprehensive motion for a summary adjudication which sought to strike from the defendants' answers the government contractor's defense. (Exhibits 53 and 55, Appellants' Excerpts of Record.) Among others, the reasons set forth in Arguments I and II of this petition were advanced in support of that motion.

We respectfully submit that, as a matter of law, the necessary conditions for the application of the defense do not exist in this case. There is no conflict between the contractual provision in question and the respondents have failed to show that the decision to use loctite was a discretionary decision of the Government. In fact, on the latter point, PSI has demonstrated the very opposite. For these reasons, petitioners motion should have been granted.

IV.

THE RECORD REVEALS GENUINE ISSUES OF MATERIAL FACT REGARDING THE APPLICABILITY OF THE GOVERNMENT CONTRACTOR'S DEFENSE

We have contended in Argument II that, at a minimum, it is a genuine and material issue in this case whether the Government exercised any discretion in approving the use of loctite in the speed sensor. This issue goes to the first of the three tests determining the scope of displacement, *i.e.*, whether the Government approved the specification at issue.

It is also a genuine issue of fact, in the event the government contractor's defense is applied, whether warnings as to the use of loctite were adequate. Here the issue is framed by PSI's position that the maintenance manual, as PSI had prepared it, adequately dealt with the possibility that excessive loctite had been applied and that the manual assured that any anomalous function resulting from that misapplication would be disclosed, and Mr. McKeown's testimony that the same manual had to be (and was) changed after Major Guerinot's death because the manual's provisions for preventing fouling of the plunger shaft by loctite were inadequate. (Exhibit 56 and Clerk's Record 55, pp. 16-17, Appellants' Excerpts of Record.)

Petitioners have referred to Mr. McKeown's testimony, and argued its significance, before both the district court and the court of appeals but both courts have simply overlooked it. The court of appeals concluded that if the instructions of the manual would have been followed, the contamination would have been

prevented. (Appendix, pp. A4-A5, *infra.*) This very simply dismisses Mr. McKeown's testimony, which was to the contrary.

In a motion for summary judgment, the inferences must be drawn in favor of the nonmovant (*Matsushita Electric Industrial Co. v. Zenith Radio Co.*, 475 U.S. 574, 587 (1986)), and the evidence of the nonmovant must be believed. (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).) Time and again, including in the papers filed in support of petitioners' motion and in opposition to respondents' motions for summary, petitioners have pointed to the 'specific fact' of Mr. McKeown's testimony which showed there is a genuine issue whether the warnings and procedures of the maintenance manual were adequate, as was petitioners' duty to do. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) [nonmoving party must designate specific facts showing there is a genuine issue for trial].) Yet, neither the district court nor the court of appeals took the slightest note of it, but instead resolved this contested issue of fact adversely to the petitioners. (Appendix, pp. A4-A5, B4, *infra.*) This was error, and has deprived the petitioners of their right to a trial by jury.

V.

DEFENSES SHOULD NOT BE DEEMED ABANDONED WHEN THE PARTY RAISING THOSE DEFENSES HAS NOT MANIFESTED ANY INTENT TO ABANDON THEM

In their motions for summary judgments, respondents took the position that petitioners had abandoned their

theories that the design of the speed sensor was defective because it failed safe into the high mode and the unit was defective because of metal corrosion caused by dissimilar metals.

After argument on the motions, and before the district court made its decision and entered judgment, petitioners made a written submission in which they pointed out that they had not abandoned any theory of recovery, referring to respondents' comments during argument on the motions that metal corrosion had been abandoned by petitioners. (Exhibit 58, Appellants' Excerpts of Record.) Petitioners pointed out that while there was some evidence which showed metal corrosion did not cause the delay in plunger extension, there was other evidence which showed it was a contributing cause. (Exhibit 58.) Petitioners also pointed out that *work* (and not discovery) on a complicated case proceeds to the eve of trial, and that, in any event, disputed questions of fact are not be resolved on summary judgement. Clearly, petitioners are entitled to favorable inferences on a summary judgment motion and they did point to testimony which showed that metal corrosion may have contributed to the delay in extension.

Both the district court and the court of appeals ignored all this and held that petitioners had abandoned that which they strenuously claimed they had not abandoned. (Appendix, pp. B6, A9, *infra.*) In fact petitioners devoted a separate argument in their Opening Brief, filed in the court of appeals, to the point that while they faced hurdles on their claim that failing safe into the high mode had been a discretionary decision by the Navy, the state of the record on the motions for summary judgment did not, without more, warrant the conclusion that it had been a discretionary decision. Petitioners' careful and repeated exposition that it had

not abandoned these defenses, and petitioners explanation of the scope of these defenses, were all lumped into one claim petitioners had not made, *i.e.*, that they wanted to engage in more discovery. The court of appeals', and the district court's, conclusion on this matter squares neither with the record nor with the position petitioners have consistently taken.

Petitioners fairly summarized the record, and pointed to evidence which indicated that their supplementary theories of recovery were very much alive. It was error to ascribe to them a position they did not take, *i.e.*, that more discovery was required and, notwithstanding their repeated written submissions to the contrary, conclude they had abandoned these theories.

CONCLUSION

For the reasons given, we respectfully submit this petition for certiorari should be granted.

DATED: April 15, 1991.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 18 1991
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

MARILYN GUERINOT, individually and as representative of the Estate of Thomas C. Guerinot and as next friend of Timothy Guerinot and Jonathan Guerinot, minors,

Plaintiff — Appellant,

v.

ROCKWELL INTERNATIONAL CORPORATION; PRECISION SENSORS, INC.,

Defendants — Appellees.

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, Senior Judge, Presiding

No. 89-55881
D.C. No. CV-86-0394T
Argued and Submitted July 13, 1990
Pasadena, California

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: REINHARDT and HALL, Circuit Judges, and RE,** Chief Judge.

This is a diversity case arising from a malfunctioning military aircraft ejection seat which resulted in the death of Major Thomas C. Guerinot, the decedent of appellant Marilyn Guerinot. The appellant appeals from an order of the United States District Court for the Southern District of California granting appellees', Rockwell International Corp. (Rockwell) and Precision Sensors, Inc. (PSI), motion for summary judgment. The district court held that Rockwell and PSI were protected or immune from liability by the Government Contractor's defense. Concluding that they had been abandoned, the court also dismissed two of appellant's other theories of liability.

On appeal, appellant asks this court to consider whether the district court erred in: (1) its application of the Government Contractor's defense; (2) concluding that no genuine issues of material fact exist as to any of the elements of the Government Contractor's defense; and (3) concluding that the appellant had abandoned two theories of liability. On the facts before this court, which are not genuinely in dispute, we hold that the Government Contractor's defense was properly applied and that appellees cannot be held liable. Accordingly, we affirm the decision of the district court.

BACKGROUND

In November 1963, the Department of the Navy issued a "Type Specification" as to a proposal seeking a light counterinsurgency, armed aircraft, Model OV-10A.

** The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

The Type Specification required "emergency escape throughout the entire flight envelope of the aircraft . . . including ground level escape at zero airspeed." In September 1964, shortly after the Navy issued its testing requirements for Model OV-10A, Rockwell issued document NA64H-895. This document contained specifications for a dual mode sensor system which would use altitude and airspeed to activate the ejection seat system in either a high or low mode.

Specification NA64H-895, and other evidence in the record, set forth the manner of operation of the ejection system. The system allows the pilot in the front seat to initiate ejection and parachute deployment for both the front and rear seats. The speed sensor determines when the ejection seats deploys, based on altitude and airspeed. In low mode, there is a one-eighth of a second delay between the moment the seat begins to move and the beginning of parachute deployment. In high mode, the delay is extended to two seconds to allow enough time, before parachute deployment, for the seat to clear the aircraft. After testing, the Navy issued document SD-556-1 which specified that the ejection seat system be built in accordance with specification NA64H-895.

After further negotiations, the Navy, in 1966, ordered 223 model OV-10A aircraft from Rockwell. Rockwell, in turn, contracted with PSI for the manufacture of a speed sensor, in accordance with Navy approved specifications, which would activate the ejection system.

In May 1971, the Navy requested that Rockwell refine the airspeed tolerance specification for the -1 sensor. Rockwell requested that PSI manufacture the EDS74DC-9 sensor (the "-9 sensor") to meet the new Navy specifications. Beginning in 1972, the -9 sensor was incorporated into the model OV-10A aircraft, including the aircraft Major Guerinot was ejecting from when he died. the -9 sensor changed the lower airspeed

limit for ejection in high mode, thereby increasing the airspeed limit for low mode ejection. The Navy requested the change after determining that safer ejection would occur with a higher airspeed limit for low-mode ejection.

The -9 sensor, like all of the sensors manufactured by PSI, uses an end cap which is threaded onto a plunger. To ensure that the end cap is properly attached to the plunger, and to prevent movement of the endcap, a locking agent must be used. PSI uses, in all its sensors, an industrial strength thread locking compound called loctite. Loctite, an adhesive which hardens in the absence of air, helps maintain the proper clearance between the endcap and the plunger, and prevents thread movement, is widely used by the Navy and the industry.

In 1980, despite PSI's objections, the Naval Air Rework Facility of Cherry Points, North Carolina (the NARF) used a -1 sensor manual to disassemble and overhaul the -9 sensor. During the overhaul, the NARF applied loctite to the plunger and endcap.

On November 16, 1984, the Model OV-10A aircraft, equipped with the overhauled -9 sensor, with decedent Major Guerinot as co-pilot, crashed during a simulated single engine landing at Camp Pendleton, California. The pilot, Captain Mueller, who controlled ejection, initiated ejection for both seats. It is undisputed that Major Guerinot's seat did not function in the low mode ejection sequence, and he died when his seat hit the ground.

After the accident, the Navy conducted an investigation. The Navy accident report states that an investigation of the -9 sensor "revealed that extraneous [loctite] contamination was most probably introduced during the last [overhaul]." Further, evidence reveals that the extraneous loctite contamination was sufficient to cause the plunger to activate improperly, and the extraneous

loctite would not have caused the accident if the curing and testing requirements had been followed when the sensor was overhauled.

DISCUSSION

Viewing the evidence in the light most favorable to the nonmoving party, we review *de novo* a district court's grant of summary judgment to determine whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. *See Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

We have consistently recognized the availability of the Government Contractor's defense when a finding of liability under state law would create a significant conflict with a federal policy or interest. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448-51, (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). A recent Supreme Court decision accepted, for the most part, the defense as laid out in *McKay*. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, ___, 108 S. Ct. 2510, 2518 (1988). Hence, when as here, an action is brought to recover damages suffered in the course of military duties and attributable to allegedly defective military equipment designed in accordance with government-approved specifications, the Military Contractor's defense is available to displace state law in order to protect identified federal interests. *See Boyle*, 108 S. Ct. at 2518; *McKay*, 704 F.2d at 451.

In *Boyle*, the Supreme Court observed that disputes between private parties may have an adverse impact upon the federal government's interest in the procurement of military equipment. *See* 108 S. Ct. at 2515. The Court stated that "[t]he imposition of [state tort] liability on Government contractors will directly affect the terms

of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* The Court, however, added that a finding that an interest or policy of the United States i affected when it procures military equipment from an outside contractor, although a necessary first step, does not end the inquiry. For state law to be displaced, a "significant conflict" must exist between the federal policy or interest and a finding of liability under state law. *See id.*

The Court in *Boyle* reasoned that since the Government is immune from liability when it exercises its discretion in producing its own military equipment, the same protection should under some circumstances, be afforded outside military contractors when they are acting on government approved specifications. *See id.* at 2517-18. The circumstances which would require displacement of state law exist when there is a "significant conflict" between a finding of state liability and the federal policy or interest involved. *See id.* at 2518. If a defendant meets the three part test as set out in *Boyle*, a conflict exists and state law will be displaced. The conflict exists when: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* The *Boyle* analysis "assures[s] that the suit is within the area where the policy of the 'discretionary function' would be frustrated — *i.e.*, [it] assure[s] that the design feature in question" was a result of a government officer's consideration of the specifications, not merely the result of a decision made by the contractor. *Id.* Hence, we conclude, as did the district

court, that this formulation or analysis must be applied to the facts now before us.

Pursuant to the *Boyle* analysis, in the present case we must first determine whether there is a federal interest or policy that would be affected if liability is imposed upon the defendants under state law. The present case presents facts similar to those in *Boyle*. If liability is imposed, the result will likely be that the contractor will either increase prices in order to insure against future liability, or the contractor will decline future contracts. It seems clear that this directly affects the government's interest in procuring military equipment from outside contractors.

The appellant strenuously argues that before the three-part test is applied, this court must first find a conflict between a federal interest embodied in the contract requirements and the duty imposed by state law. The *Boyle* analysis, however, does not require, as appellant contends, that the Government have an interest in each and every feature of the aircraft. Rather, once a federal interest or policy has been identified, here, the procurement of military aircraft, the court must then determine, without regard to the contract requirements, whether a "significant conflict" exists between that interest or policy and a finding of liability under state law.

The next step is to address the *Boyle* three part test. First, did the United States approve reasonably precise specifications? The design must have been a result of continuous "back and forth discussions" between the Navy and the contractor, ensuring that the Government's approval was more than a "rubber stamp." *See Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 110 S. Ct. 329 (1989). Additionally, the choice of a design which was produced by the contractor rather than the Government can still represent

a significant policy decision if the Government approved reasonably precise specifications. See *Boyle*, 108 S. Ct. at 2518.

During the development of the ejection system and its sensor, the Navy specified that the system be built in accordance with Rockwell's specification NA64H-895 by issuing documents SD-556-1 and SD-556-2. The system was originally equipped with the -1 sensor, and later with the -9 sensor. There is extensive documentation that the Navy and Rockwell interacted in more than a cursory way in their negotiations. The Navy required specific tests for the ejection system and changes were made as a result of certain failures during the tests. Specifications relating to the speed sensor were approved by the Navy. Additionally, although the Navy did not specifically require the use of loctite as a locking agent, the specifications state that an epoxy may be used as a locking agent, and evidence in the record indicates that the Navy has approved the use of loctite as an epoxy. Further, ample opportunity existed for the Navy to disapprove of its use. Loctite was used for many years in the model OV-10A aircraft and was applied to the aircraft in question by the NARF in 1980. Hence, it seems clear that the Navy approved reasonably precise specifications. *See Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1025 (S.D. Ill. 1989).

The second *Boyle* element requires that the equipment conform to those specifications. The appellant does not claim that the speed sensor, with loctite as the locking agent, deviates from the specifications. Rather, the appellant claims the decision to use loctite was in error. Therefore, there is no issue of material fact as to the second *Boyle* element.

The third element requires contractors to warn of defects known to them but not known to the Government. There is no evidence that PSI or Rockwell knew

of any incident where a plunger of a sensor was hindered from functioning properly due to loctite contamination. Further, the overhaul manual, had its instructions been followed, would have guarded against the loctite contamination. However, its instructions were not followed. Since the contractor is only under a duty to warn of risks known to it but not to the Government, and is not held to a "should have known" standard, we conclude that appellees have met their duty to warn. *See Trevino*, 865 F.2d at 1487.

In sum, since the three prongs of the *Boyle* test are met, and there are no issues of material fact, state law will be displaced, and the Government Contractor's defense will protect the appellees from liability.

Since the evidentiary burden of showing a "genuine, triable issue of material fact" was not met despite the time available in the three years between the filing of the complaint and the motion for summary judgment, appellant's other theories of liability were properly dismissed as abandoned. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326-27 (1986). Accordingly, the district court's entry of summary judgment is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED
May 9 1989
Clerk U.S. District Court
Southern District of California
By Deputy

MARILYN GUERINOT, et al.,
Plaintiffs,
v.
ROCKWELL INTERNATIONAL CORPORATION, et al.,
Defendants.

Case No. 86-0394-T

ORDER RE SUMMARY JUDGMENT

The motion for summary judgment made by defendants ROCKWELL INTERNATIONAL CORPORATION ("Rockwell") and PRECISION SENSORS, INC. ("PSI") came on for hearing in Courtroom Nine, of the above-entitled court, on March 9, 1989, at 10:30 a.m., the Honorable Howard B. Turrentine, presiding. David Harney and Thomas Kallay, HARNEY, WOLFE, SHALLER & CARR, appeared on behalf of plaintiffs; James W. Hunt and George M. Stevens, Jr., appeared on behalf of defendant ROCKWELL; and Ralph S. LaMontagne, Jr., and Allan M. Bower, BRONSON, BRONSON & MCKINNON, appeared on behalf of defendant PSI.

The court, having considered the extensive briefs submitted by the parties in support of and in opposition to the motion for summary judgment, the evidence and

factual submissions filed in support thereof, the argument of counsel at the time of the hearing, the final briefs submitted at the court's request, the pleadings and papers on file herein, and good cause otherwise showing therefore, makes the following findings and order:

I. PRODUCTION OF THE -9 SENSOR

In mid-1971, the Navy requested ROCKWELL to prepare an Engineering Change Proposal ("ECP") to refine the airspeed tolerance specification for the EDS74DC-1-sensor (the "-1 sensor"), which was originally designed and manufactured by PSI, pursuant to Navy specifications. To accomplish the changes requested by the Navy, ECP No. 334 was prepared by ROCKWELL and submitted to the Navy. ECP No. 334 was specifically approved by the Navy.

As a result of and in response to the Navy ECP No. 334, and entirely new sensor, PSI part number EDS74DC-9 (the "-9 sensor") was designed and manufactured by PSI. The -9 sensor was desinged [*sic*] to meet the requirements set forth in Rockwell Control Drawing HE 289-5001 and Rockwell Procurement Specification No. HC-289-5001. Both the Control Drawing and the Procurement Specification contained the -9 sensor requirements which were approved by the Navy.

PSI began supplying -9 sensors on or about 1972, in accordance with the above-referenced specifications. Retrofit of the -9 sensor in the OV-10A aircraft, in place of the -01 sensor, was incorporated under Navy Air Crew System Change No. 252. The -9 sensor was eventually installed in the accident aircraft (serial number 334), which was shipped directly to the Navy in November, 1975.

The -9 sensor, like all of the sensors manufactured by PSI, utilized an end cap which is threaded onto the plunger. Since the internal position of the plunger vis-a-vis the latch mechanism is a critical dimension which must be carefully controlled and maintained, PSI designed the -1 and -9 sensors to utilize loctite. Loctite, an anerobic adhesive which hardens in the absence of air, helps to maintain the appropriate clearance after assembly and prevents the movement of the threads.

Loctite is an industrial strength thread locking compound which has wide application and use in both industry and by the Navy. The properties of the Loctite used on the end cap are spelled out in a specific military specification, MIL-S-46163, Type I, Grade K. PSI utilized and relied upon that specification in the design of the -9 sensor and the use of Loctite in it.

During the design phase, all specifications supplied by ROCKWELL, including the military specifications referred to, were analyzed and reviewed to ensure that the -9 sensor complied with same. When the design of the -9 sensor was defined for production purposes, it met all applicable specifications. Thereafter, before shipment from PSI, each -9 sensor underwent extensive and detailed testing to ensure compliance with the applicable specifications.

II. THE OVERHAUL MANUAL

PSI produced an overhaul manual for the -1 sensor. That manual was eventually published by the U.S. government. When the -9 sensor was produced, the Navy declined to purchase an overhaul manual for this component. Because of the differences in the internal construction of the two sensors, PSI advised the Navy not to prepare overhaul instructions based upon the revisions of the -1 sensor overhaul manual.

During late 1981, PSI became aware that the Navy was attempting to overhaul -9 sensors using the -1 manual. PSI wrote to the Naval Air Rework Facility at Cherry Point, North Carolina, on Jnauary [*sic*] 12, 1982, advising the Navy, in the strongest terms, not to attempt to overhaul the -9 sensors without proper documentation, and further, recommended that PSI be retained to conduct the overhauls. PSI also recommended that a training course be given at PSI's plant for the Navy's overhaul personnel.

III. MAINTENANCE AND OVERHAUL

The -9 sensor on the accident aircraft was completely disassembled and overhauled by the Naval Air Rework Facility ("NARF") at Cherry Point, North Carolina, in the fourth quarter of 1980. NARF did not, at that time, have an overhaul manual for the -9 sensor prepared by PSI. Instead, NARF followed the manual prepared for the -1 sensor in overhauling the -9 sensor. During the overhaul, Loctite was applied to the plunger end cap by NARF. While there was no -9 sensor overhaul manual available at NARF, if NARF had followed the -1 sensor manual the overhaul would have been successful and any problem with Loctite would have been discovered.

IV. THE ACCIDENT

On November 16, 1984, the Marine Corps OV-10A aircraft in which the decedent GUERINOT was riding crashed at Camp Pendleton. Major Thomas C. Guerinot was killed in that crash. The pilot attempted to eject both himself and Major Guerinot, but Major Guerinot's parachute did not deploy before he hit the ground. The aircraft was equipped with the -9 sensor, designed and manufactured by PSI.

V. POST ACCIDENT INVESTIGATION

Subsequent to the accident in which Major Guerinot was killed, the Navy conducted an investigation of the accident. The Navy determined that, while the sensors for both seats had properly activated in the ejection sequence, the low mode pyrotechnic cartridge in the rear (Major Guerinot's) seat did not discharge. Upon disassembly, Loctite was found to have contaminated the plunger and plunger bore in the -9 sensor for Major Guerinot's seat. The presence of the Loctite, alone, was sufficient to cause the hangup of the plunger. The Loctite was introduced into the sensor during the overhaul by NARF. From the time of the overhaul by NARF in the fourth quarter of 1980, to the time of the accident, the -9 sensor was not overhauled or tampered with, in any way. If the sensor had been "exercised," that is, activated, prior to the accident, the Loctite would have broken loose.

VI. ORDER

The court finds that the application of the so-called government contractor defense is appropriate in this action. The court further finds that all three tenets of the government contractor defense test are met, as set forth in *Boyle v. United Technologies*, ___ U. S. ___, 101 L. Ed. 2d 442, 458, 108 S. Ct. 2510, 2518, (1988). Specifically, based upon the factual findings set forth above, the court finds that:

(1) the United States approved reasonably precise specifications for the design and manufacture of the -9 sensor, as evidenced by the government approved Rockwell specification HC 289-5001, which provides for the use epoxy cement to lock and seal threaded parts, the Navy's adoption and use of the overhaul manual for the

-1 sensor which provides for the use of Loctite, and long-standing use of Loctite by the Navy for sensor overhauls;

(2) there is no dispute as to the second part of the *Boyle* test: plaintiffs do not argue that the equipment did not conform to the specifications;

(3) PSI had never heard of any incident in which any airspeed/altitude sensor experienced, or allegedly experienced, delayed plunger action due to Loctite contamination, in or around the plunger. Further, it is clear that the Navy knew of the possibility of contamination from Loctite, as evidenced by its own manual. There is no evidence that PSI was aware of any further risks engendered by the use of Loctite which were unknown to the Navy. As such, the court finds that PSI/ ROCKWELL met their duty to warn the Navy of dangers which they were aware.

The court finds that no issue of material fact remains with respect to these points.

Finally, the court finds that plaintiffs have abandoned two of their theories of liability, asserting (1) that the -9 sensor was defective in design as a result of its incorporation of a dual mode system which "failed safe" in the high mode, and (2) that the sensor unit was defective as a result of its utilization of dissimilar metals. Plaintiffs' arguments that they have not have [*sic*] adequate time to develop the facts supporting these theories is unavailing; this action is almost three years old — if plaintiffs have not been able to marshall any facts to support those theories in the preceding years, it is unlikely that they can develop such facts at all. Those theories of liability are dismissed. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Based on the foregoing

IT IS ORDERED that summary judgment be granted in favor of defendants ROCKWELL and PSI and as against plaintiffs with respect to the entire complaint.

DATE: 5/4/89

/s/ Howard B. Turrentine
HONORABLE H. B. TURRENTINE
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED
MAY 17 1989
Clerk U.S. District Court
Southern District of California
By Deputy

Marilyn Guerinot, et al
v.
Rockwell Int'l Corp, et al

JUDGMENT IN A CIVIL CASE
Case Number: 86-0394-T

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That summary judgment be granted in favor of defendants Rockwell and PSI and as against plaintiffs with respect to the entire complaint. . . . . .
. . . . . .

May 17, 1989
Date

WILLIAM W. LUDDY
Clerk

Tina R. Helart
By Deputy Clerk